2002

David C. Whitney, Whitney Enterprises, Inc., Con-Blast, Inc. v. Larry Faulkner, Roberta Beverly, Renee Faulkner : Brief of Appellee

Utah Supreme Court

Kira M. Slawson; Blackburn and Stoll; Attorney for Appellees.
Brad C. Smith; Stevenson and Smith; Attorney for Appellants.

IN THE SUPREME COURT FOR THE STATE OF UTAH

DAVID C. WHITNEY, an individual; WHITNEY ENTERPRISES, INC.; and CON-BLAST, INC.,	:	Supreme Court Case No.: 20020412SC
Respondents and Cross Appellants	:	
vs.	:	**Appellees Respectfully Request Oral Argument and that this Case Be Reported.**
LARRY FAULKNER, an individual and ROBERTA BEVERLY, an individual, RENEE FAULKNER, an individual, as Garnishee,	:	
Appellants and Cross Appellees.	:	

BRIEF OF APPELLEE AND CROSS APPELLANTS

Appeal from the Judgment and Order of the Honorable Stanton M. Taylor
Second Judicial District Court for Weber County, State of Utah.

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I. STATEMENT OF JURISDICTION

This appeal is in a civil case from a ruling of the Second Judicial District Court, Weber County, the Honorable Stanton M. Taylor presiding. The Utah Supreme Court has jurisdiction pursuant to *Utah Code Ann.* §78-2-2(3)(j) (2003).

II. STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

Issue No. 1: Was Larry Faulkner's Renunciation valid to disclaim his interest in the Trust Property?

This issue was preserved at R. 602-04 and 822-28.

Standard of Review: Whether a renunciation or disclaimer is effective is a question of fact. *In re Rohn's Estate*, 175 N.W.2d 419 (Iowa 1970) (the effectiveness of a renunciation is a question of fact); *96 C.J.S., Wills, §1714* (whether a disclaimer is sufficient is a question of fact). Whether a beneficiary has accepted property is a question of fact. *In re O'Byrne's Will*, 142 N.Y.S.2d 458, 459 (Sur. Ct. 1955). Whether an acceptance of property sought to be disclaimed bars the disclaimer under Utah Code is a mixed question of fact and law. In this case the Trial Court made a factual determination that Mr. Faulkner had accepted trust property. The Trial Court then needed to determine whether the acceptance of Trust property barred Mr. Faulkner's attempted disclaimer under Utah Code Annotated §75-2-801. The Trial Court applied U.C.A. §75-2-801 to the facts of this case and determined that Mr. Faulkner's acceptance of some trust property barred his disclaimer. According to *State v. Pena*, 869 P.2d 932, 936-40 (Utah 1994), when a trial court is asked to determine "whether a given set of facts comes within the

reach of a given rule of law" the trial court is given a de facto grant of discretion. Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and make the determination. *State v. Pena*, 869 P.2d 932, 939-40 n.5. (Utah 1994). A trial court's application of law to the facts is reviewed for abuse of discretion. *Platts v. Parents Helping Parents dba Turnabout*, 947 P.2d 658, 661 (Utah 1997).

Issue No. 2. Is Cross Appellant/Plaintiff David Whitney entitled to pre-judgment interest on the amount in Garnishee's possession which was payable to Plaintiff upon service of the writ of garnishment?

This issue was preserved at R. 860.

Standard of Review: Entitlement to prejudgment interest presents a question of law, reviewed for correctness. *Andreason v. Aetna Cas. & Sur. Co.*, 848 P.2d 171, 177 (Utah Ct. App. 1993); *Cornia v. Wilcox*, 898 P.2d 1379, 1387 (Utah 1995).

III. DETERMINATIVE STATUTORY PROVISIONS

The issue of whether Mr. Faulkner's disclaimer is valid is governed by **Utah Code Annotated §75-2-801.** (Utah's Disclaimer Statute). A full copy of the Code section is set forth in the Appellee's Addendum attached herewith.

The issue of prejudgment interest is governed by **Utah Code Annotated, §15-1-1**, which provides:

(1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

(3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

Prejudgment interest is also governed by the following Utah cases: *Cornia v.* Wilcox, 898 P.2d 1379, 1387 (Utah 1995); *Andreason v. Aetna Cas. & Sur. Co.*, 848 P.2d 171 (Utah Ct. App. 1993); *Bjork v. April Industries, Inc.*, 560 P.2d 315 (Utah 1977), *cert. denied*, 431 U.S. 930; *L&A Drywall, Inc. v. Whitmore Constr. Co.*, 608 P.2d 626 (Utah 1980); *Vasels v. Lo Guidice*, 740 P.2d 1375 (Utah Ct. App. 1987).

IV. STATEMENT OF THE CASE

A. Nature of the Case and Course of the Proceedings

In 1986 the United States District Court of Utah entered a fraud judgment against Larry Faulkner and Roberta Beverly. The Judgment was domesticated and renewed in 1996 in the Second Judicial District Court of Weber County in 1996. Renee Faulkner is the wife of Larry Faulkner. In 1992, Jennie A. Faulkner, the mother of defendant Larry Faulkner, created a trust which was amended in 1996 and 1997. Under the Trust and its amendments, the Trust left specific bequests to Jennie's daughters and grandsons and left the residuum of her estate to her son, Larry Faulkner and her daughter-in-law Renee Faulkner. In the event that either Larry or Renee predeceased Jennie, the survivor was to

succeed to the entire residue of the estate. The personal property of the estate was to be divided among Jennie's three children.

Jennie A. Faulkner died on November 9, 2000. Renee Faulkner was appointed successor trustee under the terms of the Trust. In November, 2000, shortly after Jennie Faulkner's death, family members met to distribute the personal property. Larry Faulkner took possession of several items of personal property from the Trust. He did not disclaim any interest in the Trust at that time, nor did he manifest any intent to disclaim his interest in the Trust at that time.

In approximately April 2002, Jennie Faulkner's home, in the name of the Trust, was sold. After the proceeds of the Trust were distributed, David Whitney served a Writ of Garnishment on Renee Faulkner, garnishing any property in her possession that belonged to Larry Faulkner. Ms. Faulkner filed a motion to quash the writ of garnishment and responded in the interrogatories to garnishee that she was not in possession of any monies belonging to Larry Faulkner because he had renounced his interest in the estate prior to the distribution of the residue of the Trust.

The Second District Court ultimately ruled that Mr. Faulkner's renunciation was ineffective, and therefore, one-half of the distribution made to Renee Faulkner was property subject to garnishment and payable to Whitney under the Writ of Garnishment. The Second District Court signed a Garnishee Order requiring Ms. Faulkner to pay the sum of $29,243.64 to Plaintiff. However, the Second District Court denied Plaintiff's

request for pre-judgment interest in the final Findings of Fact, Conclusions of Law, and Judgment and Garnishee Order entered May 9, 2002. Faulkner appealed the Findings of Fact and Conclusions of Law, and Judgment and Garnishee Order that required Faulkner to pay to Whitney the sum of $29,243.64. This cross-appeal is taken from that portion of the Findings of Fact and Conclusions of Law, and Judgment and Garnishee Order that denied pre-judgment interest.

B. Statement of Facts

Plaintiffs have an outstanding unsatisfied judgment against Larry Faulkner and Roberta Beverly. Larry Faulkner has not been formally employed since 1993. Mr. Faulkner's mother, Jennie A. Faulkner, was his only source of income from 1993 until her death in 2000. Mr. Faulkner has not had a bank account in at least five years. For the past 24 years, Larry Faulkner has lived at 3608 West 6000 South, Roy, Utah with his wife, Renee Faulkner. Larry Faulkner does not own a car, but drives a 1995 Toyota 4-Runner that belongs to Renee Faulkner. Larry Faulkner's gas money for the Toyota, at least in the year 2001, has come from Renee Faulkner. Larry Faulkner's spending money in the year 2001 also came from Renee Faulkner. Renee Faulkner pays the credit card bills for the Visa credit card and the Chevron credit card that Larry Faulkner uses. Renee Faulkner is Mr. Faulkner's only source of money. (R. 862-863).

On December 29, 1992, Jennie A. Faulkner, the mother of defendant Larry Faulkner, created a trust called the Jennie A. Faulkner Trust. She transferred her house at

1255 21st Street, Ogden, Utah (the "Home") into that trust. (R. 863). Jennie Faulkner amended and restated the trust on January 18, 1996 and on July 18, 1997 (Trust and all amendments herein referred to as the "Trust") (R.863). The Trust provided that upon Jennie's death, $30,000.00 or 30% (whichever was less) of the Trust estate went to her two daughters and grandsons, and the remaining 70% went to "Lawrence and Renee A. Faulkner." In the event that either Lawrence or Renee predeceased Jennie, the survivor was to succeed to the entire 70% interest in the Trust estate. (R.864). Pursuant to the Trust, items of personal and household effects were to be distributed to individuals as set forth in "Exhibit B" to the Trust. In the event that not all of the personal and household items were disposed of by "Exhibit B," the personal and household items not listed on "Exhibit B" were to go to Jennie A. Faulkner's children in approximate equal shares. (R. 863)

Jennie Faulkner died on November 9, 2000. Renee Faulkner was appointed successor trustee under the terms of the Trust. On November 18, 2000, Larry Faulkner and other family members met at Jennie's home to distribute the personal property. Some of the personal property of the Trust was located at Jennie's home, and the remainder of the personal property was located at the home of Renee and Larry Faulkner. The property located at Jennie's Home was distributed at the November 18th meeting to the three children, Glenda, Larry, and Marilyn or their representatives, and Glenda, Larry and Marilyn took possession of the property. (R. 864-5).

On November 19, 2000, there was a meeting at Renee and Larry Faulkner's house. The purpose of this meeting was to distribute the personal property which was referred to on "Exhibit B" to the Trust, which had not been distributed at the meeting the day before. Present at the November 19, 2000 meeting were Renee Faulkner, Larry Faulkner, Christie Zabriski, and Glenda Burnside. "Exhibit B" to the Trust provided that certain people, including Renee and Larry Faulkner would receive specific items of property from the Trust. On November 19, 2000, the items from "Exhibit B" to the Trust were distributed. Larry Faulkner personally took possession of several items of personal property from the Trust, including the "Exhibit B" items, television and TV stand, mattress, towels, camera, binoculars, yard tools, clock, wood mirrors, various pictures, crystal nut dishes, tablecloths, kiln, various figurines and knickknacks, hide-a-bed, Christmas lights, vacuum cleaner, patio swing, bed, and mirror. Larry Faulkner also received Jennie A. Faulkner's opal ring. (R. 865-6).

On approximately January 14, 2001, Trustee Renee Faulkner prepared an inventory of the Jennie Faulkner Estate and an accounting of the distributions made from the Trust (hereinafter referred to as "List of Distributions"). The List of Distributions was prepared to demonstrate how the personal property of the Jennie A. Faulkner Trust had been distributed. The List of Distributions indicates that specific items of personal property, as listed above, were distributed to Larry Faulkner. (R. 866).

The home of Jennie A. Faulkner (owned by the Trust) was sold in April 2001, and the proceeds of sale were delivered to Renee Faulkner as Trustee on May 1, 2001. The net proceeds of the sale of the home were $84,635.05, and there was an additional $1,820.58 cash from a Trust bank account which was held by the Trustee. The total cash in the Trust estate was $86,455.63 as of May 2, 2001. (R. 866-7).

On May 2, 2001, Orders in Supplemental Proceedings were issued against Roberta Beverly and Larry Faulkner. On May 4, 2001, Roberta Beverly was served with an Order in Supplemental Proceedings in this case which ordered her to not dispose of any of her assets pending the hearing. On May 4, 2001, Renee Faulkner as Trustee directed her attorney, Brad Smith, to distribute the cash assets from the Trust to the beneficiaries as follows: Glenda Burnside: $10,000.00; Marilyn Clements: $5,000.00; Benjamin Faulkner: $8,645.56; Christopher Faulkner: $4,322.78; and Renee Faulkner: $58,487.29. (R. 867).

On May 10, 2001, an Order in Supplemental Proceedings was served on Larry Faulkner, and a Writ of Garnishment was served on Renee Faulkner in her individual capacity as garnishee. The Order in Supplemental Proceedings served on Larry Faulkner on May 10, 2001, restrained Mr. Faulkner from assigning or disposing of any of his assets prior to the Supplemental Proceedings Order hearing. The Writ of Garnishment served on Renee Faulkner, as Garnishee, attached any monies in her possession which belonged to Larry Faulkner, and directed that she pay such funds to Plaintiff or the Court.

At the time Renee Faulkner was served with her Writ of Garnishment, she had received her alleged distribution of $58,487.29 from the Trust and had deposited it into her personal bank account. (R. 867-8).

On May 4, 2001, Larry Faulkner executed a document entitled "Renunciation of Interest." In the Renunciation of Interest executed by Larry Faulkner, the recitals of the Renunciation of Interest state that Mr. Faulkner "desires to renounce and relinquish all right, title, interest, or claim as a beneficiary of the Estate or Trust of Jennie A. Faulkner pursuant to Utah Code Ann. § 75-2-801." The operative provisions of the Renunciation, however, state, "Now, therefore, in consideration of the foregoing, and pursuant to Utah Code Ann. § 75-2-801, I, Larry C. Faulkner, hereby renounce, relinquish and otherwise forfeit all my right, title, interest, or claim as a beneficiary of the Estate of Jennie A. Faulkner as though I had predeceased her." (R. 868).

The Renunciation of Interest was filed in the Second District Court under Civil No. 013900149, on May 4, 2001. Prior to May 4, 2001, the date that the Renunciation of Interest was executed and filed with the court, Larry Faulkner had taken possession of items of personal property from the Jennie A. Faulkner Trust, including the items listed on the List of Distributions, the "Exhibit B" items, and the opal ring. Larry Faulkner did not disclaim or attempt to disclaim his interest in the Jennie A. Faulkner Estate or Trust prior to May 4, 2001. (R. 868).

After hearing on the matter, the trial court determined that Larry Faulkner's disclaimer was ineffective and barred by his acceptance of Trust property prior to his attempted disclaimer. (R. 869). The Court determined that while U.C.A. §75-2-801(1) allows partial or fractional disclaimers, Mr. Faulkner's disclaimer was clearly not a disclaimer of a partial or fractional interest. (R. 869). Rather, Mr. Faulkner attempted to disclaim his entire interest in the Estate of Jennie A. Faulkner, and thus his acceptance of property he sought to disclaim barred his disclaimer. (R. 869). The Trial Court alternatively determined that Mr. Faulkner had received and taken a benefit from the Trust by virtue of the fact that Trust property was in his home and subject to his use and enjoyment. (R. 864). The Trial Court determined that Mr. Faulkner's receipt of benefits from the Trust also barred and invalidated his disclaimer of the Trust property. (R. 870).

The Court determined that at the time the Writ of Garnishment was served upon Renee Faulkner, she was in possession of $29,243.64, which rightfully belonged to Larry Faulkner as a beneficiary of the Trust of Jennie A. Faulkner. The Court ordered Ms. Faulkner to pay $29,243.64 plus costs to Whitney. (R. 870-1).

V. SUMMARY OF THE ARGUMENT

Larry Faulkner's disclaimer was ineffective on its face to disclaim property in the Trust because the language of the disclaimer only disclaimed Faulkner's interest as a beneficiary of the Estate of Jennie Faulkner, not his interest as a beneficiary of the Trust of Jennie A. Faulkner. Because the property in Renee Faulkner's possession at the time

the Writ of Garnishment was served was the residuum of the Trust, Larry Faulkner's Renunciation was invalid to disclaim that interest.

Furthermore, Larry Faulkner's general disclaimer was an invalid disclaimer and was barred under Utah Code Annotated §75-2-801(5) by his acceptance of property and benefits from the Trust prior to his execution of the disclaimer. The Trial Court determined that Larry Faulkner took property and benefits from the Trust prior to executing his disclaimer. Whether Faulkner accepted property is a question of fact reviewed under a clearly erroneous standard. However, in this case, Faulkner failed to marshal the evidence in support of the Trial Court's factual finding, and is, thus, barred from raising that issue here.

The issue of whether the acceptance of Trust property bars the disclaimer filed by Faulkner in its entirety is a mixed question of fact and law that required the Trial Court to apply Utah Code §75-2-801 to the facts of this case. Because the appellate courts in Utah have not addressed this issue, the Trial Court should be granted de facto discretion to make such determination. Regardless, however, of whether the issue is reviewed under an abuse of discretion or correction of error standard, the Trial Court did not err in making that determination.

Utah Code requires that disclaimers describe the interest or the property being disclaimed, and that the disclaimant declare the extent of the disclaimer. U.C.A. §75-2-801(3)(a) and (b). Faulkner's disclaimer described all his interest in the Estate of Jennie

Faulkner, which was barred by his acceptance of Trust property covered by the disclaimer. Furthermore, while Larry Faulkner could have executed a partial or fractional disclaimer, he failed to do so. The Trial Court determined that Faulkner's general disclaimer was barred by Utah Code Section 75-2-801 by his acceptance of Trust property, and that the language of the disclaimer was not a partial or fractional disclaimer. The Trial Court's decision should be affirmed.

Finally, the Trial Court erred in failing to assess prejudgment interest on the amount subject to the Garnishment Order. Prejudgment interest is appropriate under Utah law where the damages are complete, the loss can be measured by facts and figures, and the amount of the loss is fixed as of a particular time. The garnishment amount meets each of these tests. When the Writ of Garnishment was served on May 10, 2001, Renee Faulkner had in her possession $29,243.64 that properly belonged to Larry Faulkner. Although Ms. Faulkner took the position that such money belonged to her by virtue of Larry Faulkner's disclaimer, the Trial Court disagreed and determined that the $29,243.64 should have been paid to Whitney pursuant to the Writ of Garnishment, the same as if Renee Faulkner had properly answered the interrogatories. Thus as of May 10, 2001, Renee Faulkner had $29,243.64 that should have been paid to Faulkner. Whitney, who stood in the shoes of Faulkner pursuant to the Writ of Garnishment, was entitled to have that money paid. When Renee Faulkner failed to pay the money, the damages were fixed

as of a certain date, and prejudgment interest was appropriate under Utah Code Ann. §15-1-1. The Trial Court's decision on prejudgment interest should be reversed.

VI. ARGUMENT

Utah's disclaimer statute, §75-2-801 does not address the use of disclaimers to avoid valid judgment creditors. Nor, is there any relevant controlling case law in Utah on this issue. There has always been a common law right that a beneficiary can disclaim an interest. This is based on the premise that the law will not impose unwanted gifts on beneficiaries. *96 C.J.S., Wills §1708*, citing *Essen v. Gilmore*, 607 N.W.2d 829 (Neb. 2000). While, the states are divided on whether a beneficiary can use a disclaimer to defeat valid creditors, the majority of states permit a disclaimer to prevent the disclaimant's creditors from reaching the disclaimed property. *Trew v. Trew*, 558 N.W.2d 314 (Neb. 1996), *rev'd on other grounds* 567 N.W.2d 284 (Neb. 1997); *see also Tomkins State Bank v. Niles*, 537 N.E.2d 274 (Ill. 1989).

The Internal Revenue Service has significant experience in determining the validity of disclaimers and they require strict compliance with statutory and regulatory requirements to effectuate a valid disclaimer. 26 U.S.C §2518(b) and 26 C.F.R. §25.2518-2(a). Because the IRS has had significant experience in construing the validity and effectiveness of disclaimers, their treatment of the issue is instructive.

In this case, Whitney is not asking the Court to apply form over substance in construing the statute. Rather, Whitney asked the Court to look carefully at the language

of the disclaimer, to determine whether under the terms of the statute Faulkner's disclaimer was barred. This is consistent with the Courts' approach as shown below, and is not in violation of Utah Code Ann.§68-3-2,[1] as suggested by Faulkner.

A. FAULKNER'S RENUNCIATION OF HIS INTEREST IN THE TRUST WAS INEFFECTIVE AND STATUTORILY BARRED.

1. On Its Face, The Renunciation Was Ineffective to Disclaim Faulkner's Interest in the Trust.

Because the Trial Court properly determined that Faulkner's disclaimer was statutorily barred by his acceptance of Trust property, the Trial Court did not rule whether Faulkner's disclaimer was valid to disclaim Faulkner's interest in the Trust.[2] However, the disclaimer executed by Mr. Faulkner was ineffective on its face. Utah Code Annotated §75-2-801 addresses disclaimers in Utah, and provides that "a person . . . to whom an interest in or with respect to property or an interest therein devolves . . . may disclaim it in whole or in party by delivering or filing a written disclaimer under this section." U.C.A.§75-2-801(1) (2003). The disclaimer must be delivered or filed not later than nine months after the effective date of the nontestamentary instrument. U.C.A.§75-2-801(2)(b). The disclaimer, or a copy thereof, must be delivered in person or

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[1]U.C.A. §68-3-2 provides that all statutes shall be liberally construed, even when in derogation of the common law.

[2]This issue was raised below at R. 822-25.

mailed by certified mail to the person who has legal title to, or possession of the interest disclaimed. *Id.* Utah Code U.C.A.§75-2-801(3) provides that:

> (3) The disclaimer shall:
>
> (a) describe the property or interest disclaimed;
>
> (b) declare the disclaimer and extent thereof; and
>
> (c) be signed by the disclaimant.

It is undisputed that Larry Faulkner is a named beneficiary of the Trust, and that as Jennie Faulkner's son, Larry Faulkner is a beneficiary of Jennie's estate. Mr. Faulkner's attorney prepared an instrument entitled "Renunciation of Interest," purporting to comply with Utah Code Ann. §75-2-801. Although the recitals of the Renunciation of Interest state that Mr. Faulkner "desires to renounce and relinquish all right, title, interest or claim as a beneficiary of the estate or trust of Jennie A. Faulkner, pursuant to Utah Code Ann. §75-2-801," in the operative provisions of the Renunciation, Mr. Faulkner did not renounce his **interest as a beneficiary of the Trust**. Rather, the renunciation stated: "Now therefore, in consideration of the foregoing, and pursuant to Utah Code Ann.§75-2-801, I, Lawrence C. Faulkner, hereby renounce, relinquish, and otherwise forfeit all my right, title, interest, or claim **as a beneficiary of the estate** of Jennie A. Faulkner as though I had predeceased her." (Emphasis added).

The language of the disclaimer which was drafted by Mr. Faulkner's attorney, disclaims only Mr. Faulkner's interest as a beneficiary of the estate of Jennie A. Faulkner, not Mr. Faulkner's interest in the Trust. If Faulkner were before the court seeking a

distribution from the Trust, he could point to the language of his Renunciation and take the position that he disclaimed only his interest as a beneficiary of the estate, and was therefore, entitled to take under the Trust. The disclaimer statute, Utah Code Annotated §75-2-801 requires that the disclaimer "describe the property or interest disclaimed," and that the disclaimer "declare the disclaimer and extent thereof." U.C.A.§75-2-801(3)(a) and (b). The specific language of the disclaimer signed by Faulkner described only Faulkner's interest as a beneficiary of the estate, not the Trust, and declares that he disclaims all his right, title, interest or claim as a beneficiary of the estate of Jenny A. Faulkner, but does not disclaim any interest in the Trust. Therefore, the purported Renunciation as executed by Faulkner is not an effective disclaimer of his interest as a beneficiary of the Trust under U.C.A. §75-2-801.

Because the proceeds from the sale of the home were Trust assets, Faulkner did not properly disclaim them and the $29,243.64 in Renee Faulkner's possession at the time she was served with a Writ of Garnishment properly belonged to Larry Faulkner, and were subject to garnishment.

2. Faulkner's Attempted Disclaimer Was Barred by His Prior Acceptance of Property He Sought to Disclaim.

Regardless of whether Mr. Faulkner's disclaimer was valid to disclaim Faulkner's interest in the Trust on its face, however, the Trial Court properly determined that the disclaimer was barred by Mr. Faulkner's prior acceptance of Trust Property. Mr.

Faulkner repeatedly states in his brief that he executed a valid, timely and effective disclaimer. While it is undisputed that Mr. Faulkner attempted to execute a disclaimer under Utah law on May 4, 2001,[3] the issue as to whether Mr. Faulkner's purported disclaimer was effective is a question of fact that was determined in the negative by the Trial Court. *In re Rohn's Estate*, 175 N.W.2d 419 (Iowa 1970) (effectiveness of renunciation is a question of fact; and *96 C.J.S., Wills §1714*. In this case, Judge Stanton Taylor determined that Mr. Faulkner's disclaimer was ineffective and barred for several reasons.

A. Larry Faulkner Accepted Property from the Trust Prior to Executing his General Disclaimer.

The trial court determined that Larry Faulkner accepted property and/or benefits from the Trust. (R.864-866). Acceptance is a question of fact. *96 C.J.S., Wills, §1709*, citing *In re O'Byrne's Will*, 142 N.Y.S.2d 458 (Sur. Ct. 1955). A question of fact is something that entails "the empirical, such as things, events, actions, or conditions happening, existing, or taking place." *State v. Pena*, 869 P.2d 932, 935 (Utah 1994). The question of whether Mr. Faulkner accepted personal property from the Trust is a question of fact that was answered affirmatively by the Trial Court.

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[3]The Renunciation executed by Mr. Faulkner was dated April 4, 2001, and Mr. Faulkner incorrectly identified its date as April 4, 2000 in his opening brief, but there is no dispute that Mr. Faulkner actually signed the Disclaimer on May 4, 2001. (R.422).

The Appellant argues in Footnote 6 of the Appellant's Brief that there was "significant evidence . . .that Faulkner did not accept any items of personalty." Thus, Appellant challenges a finding of fact. However, when challenging a factual finding, the Appellant is required to marshal the evidence in support of the court's finding, and ferret out the fatal flaw in the court's reasoning. *Moon v. Moon*, 973 P.2d 431, 437 (Utah Ct. App. 1999) (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991). If an Appellant fails to marshal the evidence, the appellate Court must accept the trial court's findings as true. *Valcare v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998); and *Young v. Young*, 979 P.2d 338, 345 (Utah 1999). Faulkner fails to marshal the evidence to support the trial court's finding that Faulkner's actions constituted the type of acceptance that precludes his general disclaimer. Thus, this court must accept the findings of the Trial Court as true. There can be no dispute in this appeal that Faulkner accepted property from the Trust.

Appellant also argues that Faulkner's acceptance of personal property from the Trust "does not amount to acceptance which would vitiate a disclaimer." (Appellant's Brief, p. 19). Under Utah Code Annotated Section 75-2-801 a disclaimer is barred by the acceptance of property sought to be disclaimed. U.C.A. §75-2-801(5). Appellant argues that the question of whether the acceptance amounts to one which would vitiate a disclaimer as a question of statutory interpretation, or a question of law. In fact, however, under Utah law the issue is a mixed question of fact and law. As the Georgia Supreme

Court pointed out in *Jordan v. Trower*, 431 S.E.2d 160, 162 (Ga.Ct.App. 1993), the finder of fact is authorized to determine whether the actions of the disclaimant constitute the kind of acceptance or possession of the property of the estate that would preclude the disclaimant from making a timely renunciation of his or her interest. This approach is wholly consistent with the standards of review as set forth by this court in *State v. Pena*, 869 P.2d 932 (Utah 1994).

In *Pena*, this Court stated that when a trial court is asked to determine "whether a given set of facts comes within the reach of a given rule of law" the trial court is given a de facto grant of discretion to make such determination. Until an appellate court has determined that a particular fact situation does or does not satisfy the legal standard at issue, the trial court has discretion to venture into that area and make that determination. *State v. Pena*, 869 P.2d 932, 939-40 n.5 (Utah 1994). The law sought to be applied in this case is Utah Code Ann. Section 75-2-801(5) which provides that "an acceptance of the property or interest" bars the right to disclaim property or interest. The trial court has determined that Faulkner accepted Trust property. The determination of whether such acceptance bars the right to disclaim requires the trial court to apply the code section to the facts. This is a mixed question of law and fact that warrants granting the trial court discretion in making its determination. *Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998).

In this case, the Trial Court determined that Larry Faulkner's actions constituted the kind of acceptance of the property of the estate the precluded him from making a

general renunciation of his interest in the Trust. (R. 869). The trial court was in a unique position to review the evidence and determine that Mr. Faulkner's actions manifested an intent to accept the benefits of the Trust such that his later general disclaimer was barred. This was a discretionary finding that should be reviewed under an abuse of discretion standard. *See Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998).

Regardless, however, of whether the Trial Court is reviewed under an abuse of discretion or correction of error standard, the Trial Court did not err in interpreting Utah Code §75-2-801. In order to determine whether Mr. Faulkner's acceptance of property from the Trust, bars his disclaimer, the court properly looked at the language of Mr. Faulkner's disclaimer, as well as the language of the statute. The statute requires that the disclaimer **shall** "describe the property or interest disclaimed," and "declare the disclaimer and extent thereof." U.C.A.. §75-2-801(3). Mr. Faulkner executed a disclaimer that identified the interest to be disclaimed, namely his right, title, interest or claim as a beneficiary of the estate of Jennie A. Faulkner. Faulkner further declared the extent of his disclaimer when he stated that he disclaimed **all** his right, title, interest or claim as a beneficiary of the estate of Jennie A. Faulkner. To determine whether Mr. Faulkner's acceptance of property from the trust bars his general disclaimer, the Utah Trial court did what nearly every court cited in Appellant's brief did: it looked at the language of the disclaimer and asked whether the disclaimant had accepted any property

covered by the disclaimer. Because the Trial Court determined there was an acceptance of property sought to be disclaimed, the disclaimer was barred.

Similarly, in nearly every case cited by Faulkner, the Courts looked at the language of the disclaimer and asked if the disclaimants had taken any of the property sought to be disclaimed. If the Courts determined that the disclaimants had taken property sought to be disclaimed, the disclaimers were barred. Specifically, Faulkner cites this Court to *First Nat'l Bank of Houston v. Toombs*, 431 S.W.2d 404, 407(Tex. Civ. App. 1968). In *Toombs* the disclaimants were left two gifts under a will, one was a cash bequest and an interest in personal effects, and the other was an income interest in a trust. The disclaimants took the cash and personal effects under the Will and attempted to disclaim "any benefits under the trust." The *Toombs* court looked at the language of the disclaimer and determined that the disclaimers were partial renunciations of the trust interests. Because the disclaimants had taken cash and personal effects from the Will, but had not accepted property from the Trust which they specifically sought to disclaim, the disclaimer was valid and not barred. The *Toombs* Court took the same approach that the Utah Court took by looking at the language of the disclaimer and determining whether property sought to be disclaimed had already been accepted. In *Toombs*, the disclaimers on their face purported only to disclaim the disclaimants' interests in the Trust, and did not purport to disclaim property that had already been accepted. Therefore, the disclaimers were valid.

Faulkner also cites this court to *Badouh v. Hale*, 22 S.W.2d 392 (Tex. 2000). The *Badouh* case is also consistent with Whitney's position in this case. In *Badouh*, the court took the position that the disclaimant's disclaimer as to her entire interest in the estate was barred by her exercise of dominion and control (acceptance) of property belonging to the estate. Similarly, in this case Faulkner attempted to disclaim his entire interest in the estate. His acceptance of property from the Trust bars such a disclaimer. Faulkner argues that because he only accepted items under one provision of the Trust, he was entitled to renounce property that passed to him under another provision of the Trust. Because Utah statutes permit partial disclaimers, Faulkner would have been entitled to accept some of the benefits of the trust and disclaim others. However, as discussed below, in order to effectuate such a partial disclaimer, Faulkner was required to describe the partial interest to be disclaimed, and declare the extent of the partial disclaimer. This he did not do. Rather, Faulkner executed a general disclaimer of all his right, title and interest in the Trust when he had already accepted property from the Trust. Thus under U.C.A. §75-2-801(5), and the reasoning of *Badouh*, Faulkner was barred from executing a general disclaimer.

Faulkner next cites *Bank of Delaware v. Smith*, 211 A.2d 591 (Del. Ch. 1965). In the *Bank of Delaware* case, the language of the disclaimer renounced the disclaimant's right, title and interest in the income of the trust. The court looked at the language of the disclaimer, asked whether the disclaimant had already taken income from the trust,

determined that the disclaimant had taken income from the trust, and held that the disclaimer was barred.

Faulkner also cites this court to *In Re Estate of Goldammer*, 405 N.W.2d 693 (Wis. Ct. App. 1987) which held that in the absence of a specific statutory bar, a disclaimer should be enforced according to its terms. Again, however, this case is supportive of the position taken by Whitney. Whitney's position is that the disclaimer should be enforced according to its terms. The language of the disclaimer purports to disclaim all Faulkner's interest in the Trust, but the Trial Court determined that Faulkner had already accepted property under the Trust which barred his disclaimer under Utah Code Annotated §75-2-801(5). Therefore, looking at the specific terms of the disclaimer, Utah has a statutory bar to the execution of such disclaimer.

Finally, Faulkner cites *Jordan v. Trower*, 431 S.E.2d 160 (Ga.Ct. App. 1993). In *Jordan* the court found that the disclaimant manifested an intention to disclaim, and the disclaimant's receipt of $460 from the Trust which the disclaimant paid back, did not amount to an acceptance of property sought to be disclaimed. The Court determined under those facts that the disclaimer was valid.

The only case cited by Faulkner in support of his position that his general disclaimer should not be invalidated in whole by virtue of the fact that he accepted some of the Trust property covered by the disclaimer is *In re Womble*, 289 B.R. 836 (N.D. Texas, 2003). In *Womble*, the Bankruptcy Court determined that under Texas Probate

law, Womble's acceptance of property prior to execution of the disclaimer did not invalidate the disclaimer as a whole. While the case appears to be on point, it is distinguishable from the case at bar. First, the Texas statute does not require that the extent of the disclaimer be declared as the Utah disclaimer statute does. Moreover, the Texas Bankruptcy Court's decision is anomalous with the other legal decisions rendered by Texas Courts, and the legal trends identified in the other cases cited herein. In *Womble*, the Bankruptcy Court looked at the language of the disclaimer, asked whether property subject to the disclaimer had been accepted, determined that it had, and still upheld the disclaimer as to the property that was not previously accepted. This is not the approach taken by the Texas Civil Appellate Court in *First City Nat'l Bank of Houston v. Toombs*, 431 S.W.2d 404 (Tex. Civ. App. 1968); or the Texas Supreme Court in *Badouh v. Hale*, 22 S.W.2d 392 (Texas 2000).

Further, the Bankruptcy Court's position is contrary to the dicta of the 8th Circuit Court in *In re Popkin & Stern*, 223 F.3d 764, 767 (8th Cir. 2000). In *Popkin*, the parties were disputing exactly such an issue: "whether acceptance of any part of the property covered by a disclaimer render the entire [General] disclaimer invalid as to all other property covered by it but not accepted." The 8th Circuit stated that because they had a second, more narrow Real Property Disclaimer to look to they did not need to answer that question. The 8th Circuit stated however, that even if they "were inclined to agree that the General Disclaimer–which broadly disclaims "any interest" in the [trust and estate]–is

unenforceable because [the disclaimant] accepted certain property disclaimed under it," they were "still left with the second, narrower disclaimer." *In re Popkin & Stern*, 223 F.3d 764, 767 (8th Cir. 2000). In finding that the second more narrow disclaimer was valid, the 8th Circuit stated that not only was the Real Property Disclaimer (the specific disclaimer) prima facie valid, but it was "not rendered void by the disclaimant's acceptance of property covered by it." *Id.* Therefore, while the 8th Circuit declined to answer the specific issue involved in this case, the court's dicta and approach are consistent with the proposition that a general disclaimer will be rendered void by the acceptance of property covered by it. This position is further supported by *96 C.J.S., Wills §1711* which provides:

> Even though a general disclaimer may be invalid, where the beneficiary has accepted certain personal property disclaimed under it, a more narrow real property disclaimer filed subsequently, is valid where the beneficiary never took title or possession of such real property.

96 C.J.S., Wills §1711, citing *In re Popkin v. Stern*, 223 F.3d 764, 767 (8th Cir. 2000).

The Trial Court, applying Utah Code §75-2-801 to facts of this case, determined that Faulkner's general disclaimer was statutorily barred by his prior acceptance of property covered by the general disclaimer. This conclusion is supported by the evidence, consistent with the plain terms of the statute, and consistent with the approach taken by the majority of courts. The trial court did not err or abuse its discretion in reaching such conclusion. The decision of the trial court should be affirmed.

B. Utah Code Permits Partial Disclaimers, But Faulkner Did Not Execute a Partial Disclaimer in this Case.

Appellant correctly points out that Utah's Disclaimer Statute permits disclaimers "in whole or in part." Utah Code Ann. §75-2-801. However, Utah Code Ann. §75-2-801(3), as indicated above, provides that the disclaimer **shall** "describe the property or interest disclaimed," and "declare the disclaimer and extent thereof." Further, as discussed above, examination of the contents of Mr. Faulkner's disclaimer, and determination as to whether the disclaimer is sufficient is a question of fact. *96 C.J.S., Wills, §1714*, citing *In re Rohn's Estate*, 175 N.W.2d 419 (Iowa 1970).

By statute, Mr. Faulkner was required to describe the property or interest disclaimed. U.C.A.§75-2-801(3)(a). In the recitals of his disclaimer, Mr. Faulkner states that he is a beneficiary of the Trust of Jennie A. Faulkner, and that he "desires to renounce and relinquish all right, title, interest, or claim as a beneficiary of the estate or trust of Jennie A. Faulkner." Mr. Faulkner was then required, by the statute, to "declare the disclaimer **and extent thereof**." U.C.A.§75-2-801(3)(b) (Emphasis added). Mr. Faulkner declared his disclaimer as follows:

> "I, Lawrence C. Faulkner, hereby renounce, relinquish, and otherwise forfeit **all** my right, title, interest or claim as a beneficiary of the estate of Jennie A. Faulkner."[4] (Emphasis added).

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[4] The issue of the effectiveness of the Disclaimer on its face will be discussed below in Section B.

While Utah law permits fractional or partial disclaimers, the Court looked at the language of Mr. Faulkner's attempted renunciation, and determined that Mr. Faulkner's attempted Renunciation was not a disclaimer of a partial or fractional interest thereof.[5] (R. 869). Because the disclaimer was not a partial disclaimer, but rather was a disclaimer of **all** his right, title and interest in the estate of Jennie Faulkner, Faulkner's disclaimer of **all** his interest was statutorily barred by his prior acceptance of some of the Trust Property, pursuant to Utah Code Ann. Section 75-2-801(5)(c).

Faulkner attempts to gloss over the fact that his disclaimer was a general disclaimer by stating that the item Faulkner intended to disclaim was an interest in the sales proceeds of the real estate, or the residuum of the Trust. If Faulkner, in fact, intended to disclaim an interest in the sales proceeds of the real estate, or the residuum of the Trust, he very easily could have drafted his disclaimer to that end. That is not what happened.

The Trial Court determined that while partial disclaimers are permitted, the language of Utah Code Ann. Section 75-2-801, requires that the disclaimer of a partial interest must describe the partial interest sought to be disclaimed, and must declare the extent of the disclaimer. This is the plain language of the statute, and this is not what Faulkner did. The court concluded that it would not rewrite Faulkner's disclaimer to say

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[5]Although this finding was labeled a conclusion of law, it is actually a finding of fact and the appellate courts will disregard labels on factual findings and conclusions of law and look to substance. *Fernandez v. Cook*, 870 P.2d 874-5 (Utah 1993).

something it did not say. Faulkner argues that the disclaimer statute should be construed liberally such that substantial compliance with the statute should suffice. Faulkner states he should only be required to substantially comply with the disclaimer statute because no prejudice results to Whitney. This, however, is not the point. In fact, Faulkner arguably has complied with the statute in that he described the property sought to be disclaimed and declared the extent of the disclaimer, so it is not a matter of substantial or strict compliance with the statute. Rather, Faulkner's disclaimer, as written, is a general disclaimer that is statutorily barred by his prior acceptance of Trust property. If this Court were to hold that Faulkner is permitted to disclaim a partial interest in the Trust without describing that "partial" interest and the "partial" extent of the disclaimer, the Court would be disregarding the requirement of 75-2-801(3)(a) and (b). This, the Court is not permitted to do. "In interpreting a statute, courts should avoid adding to or deleting from statutory language, unless absolutely necessary to "make it a rational statute." *Luckau v. Board of Review*, 840 P.2d 811, 815 (Utah Ct. App. 1992), citing 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.38 (5th ed. 1992); *see Resolution Trust Corp. v. Lightfoot,* 938 F.2d 65, 66-67 (7th Cir. 1991).

The Trial Court properly determined that the language of Faulkner's disclaimer was not a disclaimer of a partial or fractional interest, and thus his prior acceptance of property covered by the disclaimer barred his general disclaimer. The decision of the Trial Court should be upheld.

C. Court Did Not Rule that One Could Not Disclaim in Favor of One's Wife.

Faulkner inaccurately states that the Trial Court "also concluded that because the primary beneficiary of Faulkner's disclaimer was his wife, Renee, he could not disclaim in a way that favored her." (Appellant's Brief, p. 36). The court did not make any determination that Faulkner could not disclaim to his wife. Rather the court determined that in addition to Faulkner accepting property directly from the trust and estate, he also received a benefit from property of the Trust. It is undisputed that Larry Faulkner is wholly supported by his wife. Renee Faulkner pays for Larry Faulkner's care, the home in which he resides, his gas, his clothing and his credit cards. (R. 863). It is further undisputed that many of the items of personal property that belonged to his mother are now found in Larry Faulkner's home and are being used by him and his wife. (R. 864). Larry and Renee Faulkner in their Motion to Quash the Writ of Garnishment, initially took the position that Larry Faulkner had not taken any items of property from the Trust or estate, and that it was his wife who had taken possession of the property. (R. 315). In response to this, Whitney's position was that even if it were true that Faulkner had taken no property from the Trust, he was enjoying the benefit of that property by virtue of the fact that the property was in his home, subject to his use and enjoyment. Further, any money that was distributed to Ms. Faulkner was similarly available to Larry Faulkner. Of course, after discovery, the evidence showed that Larry Faulkner had, in fact, taken possession of several items of property from the Trust. The Trial court merely agreed that

in addition to taking actual possession of items from the Trust, Mr. Faulkner had also received a benefit from the trust property. The Court determined that the property his wife received from the Trust were available to him for his beneficial use.

Utah Code Annotated §75-2-801(5) provides that one who accepts property or a benefit therefrom is barred from disclaiming the property. The court found that Larry Faulkner had received a benefit from the Trust property and was thus barred from disclaiming his full interest in the Trust as he had attempted to do. This too is a finding of fact, and because Faulkner has failed to marshal the evidence in support of that finding, and then ferret out the fatal flaw, the finding must be affirmed by this court. *Moon v. Moon*, 973 P.2d 431, 437 (Utah Ct. App. 1999) (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

Moreover, even if this court determines that the Trial Court's finding that Faulkner accepted benefits from the Trust was in error, it was an alternate finding and is harmless error under Rule 61 of the Utah Rules of Civil Procedure.

B. THE TRIAL COURT ERRED IN FAILING TO GRANT PREJUDGMENT INTEREST ON THE GARNISHMENT AMOUNT.

After a hearing on this matter, the Trial Court ruled that Faulkner's disclaimer was ineffective and barred so that the $29,243.64 held by Renee Faulkner was properly the property of Mr. Faulkner, subject to the Writ of Garnishment served by Whitney on May 10, 2001. The issue is whether Whitney is entitled to prejudgment interest on the

garnished amount from May 10, 2001 (date Writ was served) through May 9, 2002 (date of Court's final judgment).

Utah Code Annotated Section 15-1-1 governs the rate of prejudgment interest, and provides that:

> (1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.
>
> (2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or *chose in action* shall be 10% per annum. (Emphasis added).

The Garnishment is a chose in action subject to prejudgment interest under U.C.A. §15-1-1. In *Wasatch Mining Co. v. Crescent Mining Co.*, 7 Utah 8, 24 P. 586 (1890), aff'd, 151 U.S. 317, 14 S. Ct. 348, 38 L. Ed. 177 (1894), the Utah Supreme Court found, and the United States Supreme Court affirmed, that in Utah, interest is allowed on debts overdue, even in absence of statute or contract providing therefor.

The trial court determined in a post hearing telephone conference on April 19, 2002, that Whitney was not entitled to prejudgment interest. The question of whether a plaintiff is entitled to prejudgment interest is a question of law reviewed for correctness. *Klinger v. Kightly*, 889 P.2d 1372, 1381 (Utah Ct. App.1995); *Andreason v. Aetna Cas. & Sur. Co.*, 848 P.2d 171, 177 (Utah Ct. App. 1993). Ms. Faulkner owed Mr. Faulkner, and thus Mr. Whitney, $29,243.64, when the Writ of Garnishment was served upon her. "In

Utah, prejudgment interest may be awarded in situations where the damages is complete, the loss can be measured by facts and figures, and the amount of the loss is fixed as of a particular time." *Andreason v. Aetna Cas. & Sur. Co.*, 848 P.2d 171 (Utah Ct.App. 1993). "Prejudgment interest represents an amount awarded as damages due to the defendants' delay in tendering an amount clearly owing under an agreement or other obligation. *Baker v. Dataphase, Inc.*, 781 F. Supp. 724 (D. Utah 1992) citing *L & A Drywall, Inc. v. Whitmore Constr. Co.*, 608 P.2d 626, 629 (Utah 1980), and *Vasels v. Lo Guidice*, 740 P.2d 1375, 1378 (Utah Ct. App. 1987).

In this case, the only issue was whether the money in Ms. Faulkner's possession on May 10, 2001, had been properly disclaimed by Larry Faulkner when Renee Faulkner was served with a Writ of Garnishment. If the disclaimer was invalid, Renee Faulkner was in possession of monies belonging to Larry Faulkner, and had an "obligation" to pay those monies to Whitney. Ms. Faulkner took the position that she was not in possession of any such monies, and months of litigation ensued. The trial court ultimately determined that Ms. Faulkner's position was erroneous and that the Writ of Garnishment served upon her created an obligation requiring her to pay Larry Faulkner's $29,243.64 in her possession to Mr. Whitney.

Under Rule 64D(i) if the Answers to Garnishee's Interrogatories are challenged and the court determines that the Garnishee's Answers were incorrect, "judgment shall be entered upon the verdict or finding the same as if the garnishee had answered according

to such verdict or finding." URCP 64D(i). In this case, the court determined that at the time the writ was served on May 10, 2001, Renee Faulkner had in her possession $29,243.64 that rightfully belonged to Larry Faulkner. The judgment was entered the same as if Ms. Faulkner had answered that she was indebted to Larry Faulkner in the amount of $29,243.64 as of May 10, 2001. "The law is clear that respondent is entitled to prejudgment interest on this overdue debt from that date until entry of judgment." *Fitzgerald v. Critchfield*,744 P.2d 301, 304 (Utah Ct.App. 1987), citing *Bjork v. April Indus., Inc.*, 560 P.2d 315, 317 (Utah 1977), cert. denied, 431 U.S. 930, 97 S. Ct. 2634, 53 L. Ed. 2d 245 (1977); *L & A Drywall, Inc. v. Whitmore Constr. Co.*, 608 P.2d 626, 629 (Utah 1980). The Court in *Fitzgerald* held that "the interest issue is injected by law into every action for the payment of past due money." *Fitzgerald v. Critchfield*, 744 P.2d at 304 (Utah Ct.App. 1987) quoting *Lignell v. Berg*, 593 P.2d 800, 809 (Utah 1979).

There is no question that the damages were complete and the amount of damages was never in question. When the court determined that Faulkner's disclaimer was invalid and barred, the amount subject to the Writ of Garnishment was Larry Faulkner's one-half interest in the residuum of the Jennie A. Faulkner Trust, or $29,243.64. Similarly, there was no question as to the "particular time of the loss." The money was subject to Garnishment on the date that the Writ of Garnishment was served, May 10, 2001. Therefore, the judgment amount should include the $29,243.64 plus prejudgment interest

from May 10, 2001 through date of judgment for damages due to Faulkner's delay in tendering the amount due under the Writ of Garnishment.

To put this another way, Renee Faulkner was indebted to Larry Faulkner in the amount of $29,243.64 on May 10, 2001, when the Writ of Garnishment was served. If Larry Faulkner had demanded payment as of that date and Mrs. Faulkner had refused to make payment, Mr. Faulkner would have been entitled to prejudgment interest pursuant to Utah Code and case law as cited above. Likewise, Mr. Whitney, as the Garnishment Plaintiff, is entitled to prejudgment interest on the amount which was owed to Larry Faulkner and subject to the Writ of Garnishment, but which Renee Faulkner failed and refused to deliver pursuant to the Writ of Garnishment.

Finally, prejudgment should be awarded pursuant to Utah law as a disincentive for Garnishees to unlawfully withhold monies that are otherwise subject to garnishment. The trial court erred in failing to award prejudgment interest on the $29,243.64 from May 10, 2001 through the date of judgment, and the Garnishee Defendant, Renee Faulkner should be ordered to pay prejudgment interest.

VI. CONCLUSION

The trial court properly determined that Larry Faulkner's Renunciation was invalid and barred by Faulkner's acceptance of property covered by the disclaimer. The trial court's decision should be affirmed. With regard to the prejudgment interest issue, however, the trial court erred as a matter of law in failing to award prejudgment interest

on the garnished amount as of the date of service of the writ of garnishment. The trial court's ruling prejudgment interest should be reversed as a matter of law.

Respectfully submitted this 3rd day of July, 2003.

BLACKBURN & STOLL, LC

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CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid on the 3rd day of July, 2003, to:

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